# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 575

CHARLES KEEBLE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 14–23) is reported at 347 F. 2d 951.

### JURISDICTION

The judgment of the court of appeals was entered on July 9, 1965. A petition for rehearing was denied on August 16, 1965. The petition for a writ of certiorari was filed on September 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



790-418—65

## QUESTIONS PRESENTED

1. Whether a record admitted as made in the regular course of business should have been excluded because of an ambiguity.

2. Whether argument of government counsel constituted reversible error, where the judge gave corrective instructions with respect thereto.

## STATUTE INVOLVED

28 U.S.C. 1732, entitled "Record made in regular course of business; photographic copies," provides:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

## STATEMENT

After a trial before a jury in the United States District Court for the Eastern District of Missouri, petitioner was convicted of perjury while testifying under oath at a hearing conducted by a trial examiner of the National Labor Relations Board, in violation of 18 U.S.C. 1621. He was sentenced to thirty months' imprisonment. The court of appeals affirmed (Pet. App. 14–23).

On May 9, 1962, petitioner was the secretary-treasurer of Local 916 of the International Hod Carriers and Common Laborers Union, of which Woodrow Wilson was the president and business representative (R. 255). At 8:00 a.m. on that date violence erupted at the Allen Farm near Ellington, Missouri, as a result of the union's efforts to organize a construction crew of which Owen Langston was the supervisor (R. 79–80, 134–135).

As a result of the altercation, Langston filed an unfair labor practice complaint against the union with the National Labor Relations Board (R. 4–5, Govt. Exh. 1). A hearing was held at Ellington on October 2–5, 1962. In the course of the hearing, it became relevant upon the issue of the union's fault whether its officers had been in the vicinity of the Allen farm when the violence occurred. In sworn testimony (R. 8, 21, Govt. Exh. 2), petitioner denied ever appearing at the Allen Farm on the date of the violence. He testified that on May 9 he and Wilson were at a road-

side park near Ellington at about 6:15 a.m., where they received five union authorization cards from William Larkin, a foreman of one of two crews working on the construction project. He further testified that, from the park, the union officers proceeded to the Taum Sauk Hydroelectric Dam project (R. 25), where they arrived at about 8:15 a.m., and departed at 10:00 a.m. It is this testimony which the indictment charged as false and perjurious.

At the trial, three eyewitnesses stated that they saw petitioner either at the roadside park at about 7:30 a.m., or at the Allen Farm at the time the violence erupted (R. 79, 130, 133, 153, 184, 185, 187). In addition, the visitor's log at the Taum Sauk project for May 9, 1962, was introduced in evidence as a record kept in the ordinary course of business (R. 34, 55, Govt. Exh. 3). The log entries were recorded by the guard at the main gate, who had no independent recollection of the time petitioner and Wilson arrived and departed (R. 56). An entry in the log showed that petitioner and Wilson had arrived at 10:40 a.m. and departed at 12:30 p.m. (R. 35, Govt. Exh. 3). Contrary to his prior statement, the guard insisted that the time recorded was relatively accurate, and would not be in error by two hours (R. 60). The guard could not explain an erasure appearing on the line above where the information about petitioner was recorded and conceded the possibility that the petitioner could have entered the project somewhat earlier than the time recorded if he had first gone to the dam site (R. 63). On the second sheet of the log sheet

there appeared the letters "Mon," although the day in question was a Wednesday. Neither side questioned the guard about this writing. Petitioner and Wilson testified that they drove through the main gate at 8:30 a.m. and were waved on by the guard (R. 258, 276, 282).

## ARGUMENT

1. Petitioner argues that the letters "Mon" on the second page of the log of visitors at the dam project (although the log was dated May 9, 1962, a Wednesday) created such an ambiguity in the record that the government acted improperly in offering it and the court erred in permitting it to be introduced. This objection was not raised at the trial, although petitioner had every opportunity to examine the log before it was admitted into evidence (R. 33). The record of trial shows that petitioner's counsel scanned the document closely and, in addition, referred to many portions of it while conducting a vigorous cross-examination of the records custodian and the guard (R. 42, 64, 69, 70). Petitioner makes no showing even now that there was any reason to doubt that the record was, in fact, of visitors on May 9. Despite the lack of personal recollection by the guard, the correctness of the date might well have been established by other means if any issue had been raised with respect thereto. For example, it may be that there was another log for Monday, May 7, or that the log for May 9 appeared in the book after the log for May 8. In short, petitioner cannot now raise this factual issue which he did not raise at the trial, although given every opportunity to do so. Finally, we note that

even if an ambiguity in the log had been found to exist, it would not necessarily destroy the admissibility of the log under 28 U.S.C. 1732. See *LaPorte* v. *United States*, 300 F. 2d 878 (C.A. 9).[1]

2. The remarks by government counsel which petitioner relies upon (Pet. 7–9) do not constitute a basis for reversal. The remarks as to the nature of the defense (R. 310–311, Pet. 9) are supported by the evidence. The remarks as to the veracity of the witness were evidently generated by defense counsel's own stinging comments upon the credibility of the witnesses (R. 300–303). See *Lawn* v. *United States*, 355 U.S. 339, 359. Moreover when defense objections were made, the court made it clear to the jury that its own recollection governed. For example, the court stated: "The jury will have to recall the testimony. They know that. It isn't what you people state about it but what was said from the witness stand" (R. 294). Later the court instructed that "The jury understands they are bound by the testimony as it comes from the witness stand" (R. 312).

[1] The cases cited by petitioner are not on point. In *Hartzog* v. *United States*, 217 F. 2d 706 (C.A. 4), the court held inadmissible certain worksheets made by a deceased deputy commissioner of internal revenue in preparation for prosecution, because they were the work product of his judgment rather than contemporary memoranda of events. In *Brady* v. *Maryland*, 373 U.S. 83, certain extrajudicial statements favorable to the accused were intentionally suppressed by the prosecution; petitioner alleges no such suppression here. In *United States* v. *Zborowski*, 271 F. 2d 661 (C.A. 2), the judgment was reversed because the trial court denied the accused access to the grand jury records although there were demonstrated inconsistencies in testimony.

Twice more the court rendered similar instructions after defense counsel objected to certain of the prosecutor's remarks (R. 313, 316), and on the latter occasion he stated, "Anything you attorneys say anything about that is different from their understanding of it they will not consider. They rely on their understanding of the record." Thus the trial judge took appropriate corrective action each time an objection was made and petitioner did not request a mistrial (Pet. 23). The court of appeals properly determined in these circumstances that the trial judge did not abuse his discretion by failing to grant a mistrial on his own motion. See *Isaacs* v. *United States,* 301 F. 2d 706 (C.A. 2), certiorari denied, 371 U.S. 818; *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *Cochran* v. *United States,* 310 F. 2d 585 (C.A. 8).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965